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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 378

COMMERCIAL CREDIT COMPANY, A CORPORATION,
Appellant,

vs.

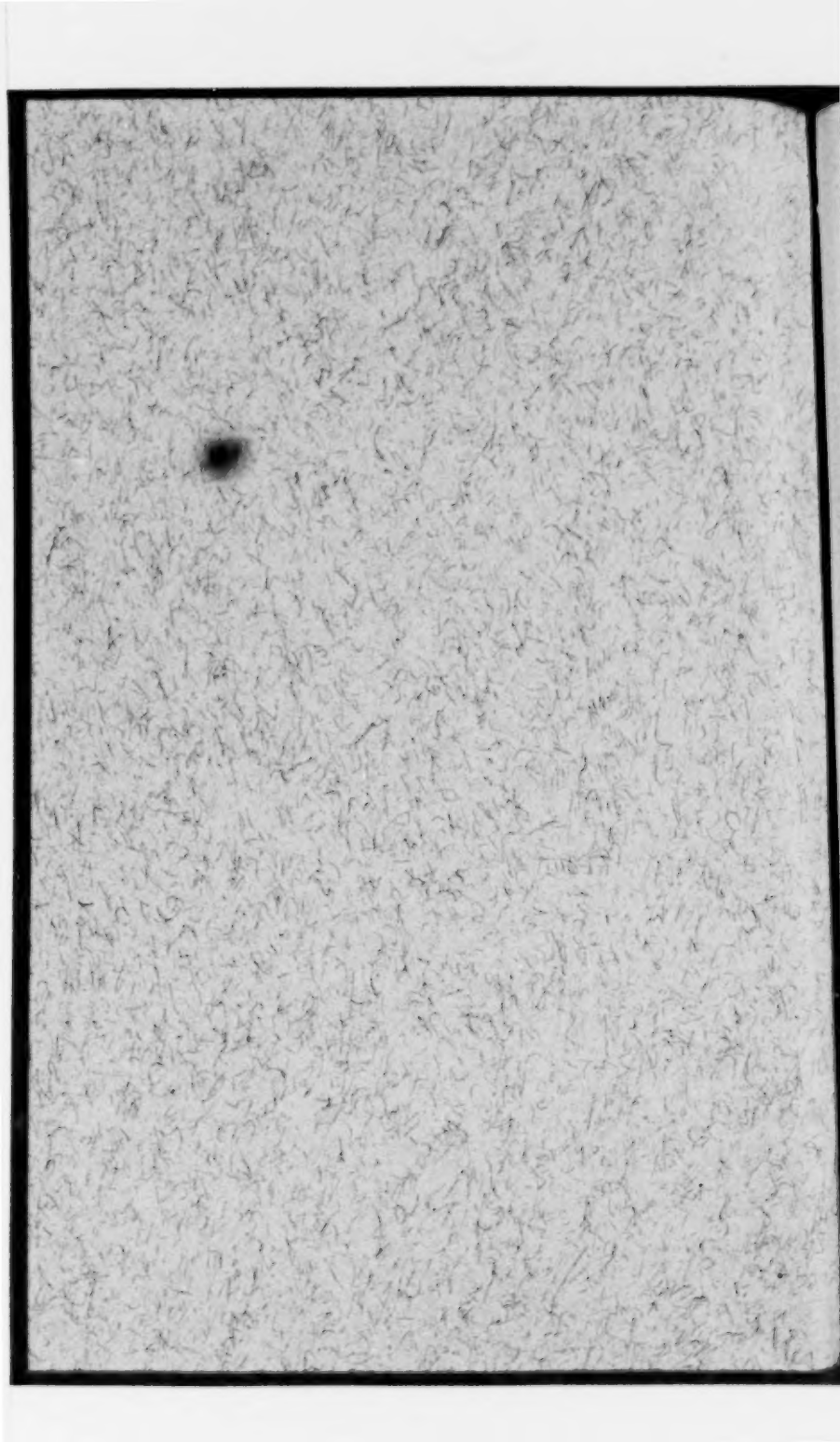
GEORGE O'BRIEN, AS COUNTY TREASURER OF THE COUNTY OF SILVER BOW, STATE OF MONTANA; BERNARD E. HOLLAND, AS CITY TREASURER OF THE CITY OF BUTTE, COUNTY OF SILVER BOW, STATE OF MONTANA; THE COUNTY OF SILVER BOW AND THE CITY OF BUTTE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

REPLY TO STATEMENT OF APPELLEES OPPOSING JURISDICTION.

NEWELL W. ELLISON,
DUANE R. DILLS,
Counsel for Appellant.

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
DILLS, MUECKE, SCHERLER & LEVINSON,
Of Counsel.



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GEORGE O'BRIEN, AS COUNTY TREASURER OF THE COUNTY OF SILVER BOW, STATE OF MONTANA; BERNARD E. HOLLAND, AS CITY TREASURER OF THE CITY OF BUTTE, COUNTY OF SILVER BOW, STATE OF MONTANA; THE COUNTY OF SILVER BOW AND THE CITY OF BUTTE,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

REPLY TO STATEMENT OF APPELLEES OPPOSING JURISDICTION.

The Statement filed by appellees in opposition to the jurisdiction of this Court merits a brief response.

I.

We do not deny, of course, that the Supreme Court of Montana did not refer to Section 2002, nor state that it

was construing it or deciding a constitutional issue. Without question, that fact is wholly immaterial. *Fiske* v. *Kansas*, 274 U. S. 380; *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427. What matters is what the Supreme Court has done—what effect upon appellant its decision has had—not what it said or left unsaid.

II.

Appellees admit that the Supreme Court of Montana has departed from the Agreed Statement of Facts. They attempt to condone this action, however, on the ground that the agreement of the parties that "the Delaware Corporation has no office, and does no business in the State of Montana" was a "conclusion of law," and not binding on the court.

The argument misses the point at issue completely. Unquestionably, by the Agreed Statement, the parties had removed from the field of controversy an ultimate fact question with many subsidiary facets—that of the "business situs" of the receivables. Unquestionably, too, all parties, appellant and appellees, were competent so to agree, as shown by the case cited in the Statement as to Jurisdiction (Point V B). Notwithstanding this disposition of the matter by the parties, the Court, in direct contradiction to the Agreed Statement, raised and decided the issue of "business situs" on its own motion.

The majority opinion of the Court should itself be more than adequate proof of the prejudice resulting to appellant from this arbitrary action. The opinion, after adverting to the stipulation and to the maxim *mobilia sequuntur personam*, states:

> "To determine whether or not the business situs rule is applicable the court must again know the true and complete facts * * *."

It then proceeds to a series of unanswered questions, many of them so phrased as to make it apparent that the Court

was assuming many basic facts against appellant. Then the opinion states:

> "To sustain a judgment for plaintiff on an agreed statement of facts, the statement must show *all the facts necessary to a recovery.*"

Yet it is precisely these facts which appellant had, properly and in good faith, eliminated from the proceeding between it and the appellees. It is precisely these facts which, in its Petition for Rehearing, it asked at least an opportunity to present, if the Court believed that "business situs" was inevitably in issue. And it is the arbitrary denial of the opportunity to present these facts which constitutes the denial of due process of which appellant now complains.

III.

Appellees' argument that the decision below is based upon adequate non-federal grounds also fails to meet the real issue. As in Point I, *supra,* appellees assume that if the Court does not *discuss* the federal question, there is no federal question. We contend, on the other hand, that the disregard by the state of the separate existence of a parent and a subsidiary corporation in the assessment and collection of *ad valorem* property taxes, particularly in view of the facts agreed to in this case, constitutes a novel federal question which has never, so far as we know, been passed on by this Court. Whether, as appellees contend, the receivables has a business situs in Montana, giving that state jurisdiction to tax, is itself a Federal Question essential to the decision of the case. (*Newark Fire Insurance Company* v. *State Board of Tax Appeals,* 307 U. S. 313.) Similarly, the action of the Supreme Court of Montana in ignoring the agreed statement raised a Federal Question essential to the decision of the case. Appellees give no indication of any adequate alternative

non-federal bases. It is significant that nowhere do appellees contend that the Federal Questions are not substantial.

IV.

The appellees' objection to the manner in which the question was raised must fail. The issue was raised in the trial court, as the Statement as to Jurisdiction shows (Point IV). There is thus no question of waiver, nor of failure to comply with state practice. The Montana Supreme Court in no way indicated that the issues were not open.

Appellees' argument that the constitutional questions cannot be raised by reference to the briefs is adequately answered by *Memphis Gas Co.* v. *Beller*, 315 U. S. 649, 651. Again, there is no state rule to the contrary. And certainly, on the denial of due process involved in the failure of the Court to grant the Petition for Rehearing (Statement as to Jurisdiction, Point V B), the issue was raised at the earliest possible time after it had been created by the opinion of the Court disregarding the Agreed Statement. *Saunders* v. *Shaw*, 244 U. S. 317.

Respectfully submitted,

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LEVINSON,
Of Counsel.

July 13, 1944.